No. 46622-8-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

RUSSELL P. HICKS,

Cross-Appellant/Respondent,

v.

CITY OF FIFE, a Washington municipal corporation,

Appellant/Respondent.

AMENDED BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant, the City of Fife, (the "City") appeals a trial court order denying its special motion to strike pursuant to Washington's anti-SLAPP statute (Strategic Lawsuits Against Public Participation), RCW 4.24.525. The statute protects parties from any claim, however characterized, targeting constitutionally protected "public participation and petition" activity. In denying the City's special motion to strike, the trial court committed error by ruling the specific retaliation claim challenged by the City was not actually a "claim" but instead merely "evidence" or "facts" that did not qualify under RCW 4.24.525.

The City is a defendant in a discrimination and retaliation lawsuit brought by Respondent Russell P. Hicks ("Hicks") under Washington's Law Against Discrimination ("WLAD"), RCW 49.60 *et seq*. Hicks is currently employed by the City as a police officer and asserts several distinct claims of retaliation: (1) an allegedly unwarranted disciplinary investigation against him; (2) an alleged failure to promote him to lieutenant; (3) an alleged failure to maintain an expiring lieutenant promotion list; and (4) an alleged failure to allow him to serve as an instructor at Washington's Criminal Justice Training Commission.

The City filed its special motion to strike in response to Hicks' third retaliation claim. Hicks alleges that Brad Blackburn, the City's

Chief of Police, attended an open public meeting of the City's Civil Service Commission and advocated for expiration of the Lieutenant Promotion Register wherein Hicks held the top ranking. After hearing from Chief Blackburn, the Commission allowed the Register to expire. Hicks states this claim in paragraph 4.3 of his complaint: "Police Chief Blackburn arrived and convinced the Commission to let the Register expire so that Hicks would no longer be at the top of the list. The Commission agreed to let the Register expire. Hicks was not promoted to Lieutenant in retaliation."

The anti-SLAPP analysis governed by RCW 4.24.525 requires a two-step analysis. First, the City is required to show, by a preponderance of the evidence, that the challenged retaliation claim is based on an action involving public participation and petition. Second, once the City meets its burden, Hicks is required to show, by a heightened clear and convincing evidence standard, a probability of prevailing on the claim.

Under the first step of the analysis, Chief Blackburn's statements during the open public meeting, and any subsequent acts taken by the Commission, constitute "public participation and petition" activity protected by RCW 4.24.525(2). Specifically, Chief Blackburn's statements constituted "any oral statement made...in connection with any issue under consideration or review by a legislature, executive, or judicial

proceeding or other governmental proceeding authorized by law." RCW 4.24.525(2)(b). Hicks opposed the motion on grounds he was not alleging several independent claims of retaliation, but instead a single unified "cause of action" under WLAD. By arguing for the consolidation of his retaliation claims, Hicks argued that the "principal thrust" or "gravamen" of his lawsuit was retaliation, not protected participation and petition activity. The trial court appears to have adopted this argument. In doing so, the trial court committed legal error by characterizing the retaliation claim involving the Commission as "evidence" or "facts" within a broader cause of action. This ignores the directive of RCW 4.24.525(2) which states that the anti-SLAPP protections apply to any claim, cause of action, or other judicial pleading requesting relief, "however characterized."

Nor did Hicks establish, by clear and convincing evidence, a probability of prevailing on the retaliation claim, as required by the second part of the anti-SLAPP analysis. In particular, Hicks never identified the Commission as a defendant, expiration of a stale promotion list is not evidence of unlawful retaliation, and the City had legitimate and non-discriminatory reasons for allowing the list to expire. Citing California precedent, Hicks attempts to turn Washington's anti-SLAPP statute on its head by arguing he need not show a probability of prevailing on the

specific retaliation claim challenged by the City, but instead *any* of the other retaliation claims alleged under WLAD. Although the trial court did not reach the merits of this argument, it is nonetheless incorrect because it conflicts with recent case law and defies the intent and purpose of Washington's anti-SLAPP statute.

The City met its burden under RCW 4.24.525 and the trial court committed error by denying the City's special motion to strike. The retaliation claim alleged by Hicks in paragraph 4.3 of his complaint should be stricken. The City should be awarded the mandatory $10,000 penalty in addition to an award of attorneys' fees and costs provided by RCW 4.24.525(6)(a).

II. ASSIGNMENT OF ERROR

Assignment of Error: The trial court committed error when it denied the City's special motion to strike pursuant to Washington's anti-SLAPP statute, RCW 4.24.525. In its special motion, the City requested the trial court strike a retaliation claim targeting protected participation and petition activity of the City's Civil Service Commission.

Issue: By ruling the "gravamen" of the retaliation claim challenged by the City in its special motion to strike did not involve protected participation and petition activity and instead was merely "evidence" or

"facts," the trial court failed comply with the scope and purpose of RCW 4.24.525.

Issue: The trial court failed to properly apply the two-step analysis mandated by RCW 4.24.525(4)(b).

III. STATEMENT OF THE CASE

A. Hicks Alleges Four Discrete Claims of Retaliation

Hicks is employed by the City as a commissioned law enforcement officer. CP 2. On June 3, 2014, Hicks filed a lawsuit against the City in Pierce County Superior Court, alleging violations of WLAD, RCW 49.60 *et seq*. CP 1. Hicks claims the City subjected him to an unlawful hostile work environment, discriminated against him, and retaliated against him for acts allegedly occurring throughout 2011 and 2012. CP 2-3. Hicks alleged several claims of retaliation against the City. The retaliation claims are based on a divergent set of facts, spanning two years, and are summarized in the following paragraphs.

First, Hicks alleges the City retaliated against him in July 2011 by failing to select him for promotion to lieutenant. CP: 2-3. Hicks occupied the top position on a previous lieutenant promotion register and alleges the City promoted a lower-ranked candidate in retaliation. *Id.* However, according to the City's civil service rules, candidates who rank first on a promotion register are not guaranteed a promotion. Fife Municipal Code

§ 2.52.160(F). Instead, the top three candidates on any register are eligible for a promotion and engage in a competitive process. *Id.* The City followed the civil service rules when selecting a candidate for promotion. The City denies liability for this claim but did not challenge the claim in its special motion to strike.

Second, in an unrelated series of events, Hicks alleges the City retaliated against him in August 2011 by initiating a disciplinary investigation. CP 2. The City initiated the investigation against Hicks after he was accused of insubordination and creating a hostile work environment for other employees. *Id.* The City hired an outside attorney to conduct the investigation who ultimately concluded the allegations against Hicks were unfounded. *Id.* The City cleared Hicks and did not impose discipline. *Id.* The City denies liability for this claim but did not challenge the claim in its special motion to strike.

Hicks alleges the City retaliated against him in a third event by failing to grant him permission to serve as an instructor at Washington's Criminal Justice Training Commission. CP 3. Hicks had been asked by the Commission to serve as a criminal law instructor for a period of three years, subject to approval by the City. *Id.* According to Hicks, the City refused to grant permission unless he agreed to dismiss legal claims threatened against the City. *Id.* However, Hicks was granted permission

by the City and reported for the teaching assignment on the first day. CP 3, 21. Hicks continues to serve as an instructor. *Id.* The City denies liability for this claim but did not challenge the claim in its special motion to strike.

B. The City's Motion to Strike Only Challenged the Fourth Alleged Retaliatory Event Relating to Chief Black's Statements to the Civil Service Commission during an Open Public Meeting.

The retaliation claim challenged by the City in its special motion to strike is stated in paragraph 4.3 of Hicks' complaint and involves statements by Chief Blackburn to the Civil Service Commission during an open public meeting (and any acts taken by the Commission thereafter). CP 2-3. In particular, Hicks alleges Chief Blackburn retaliated against him by speaking at the public meeting and advocating for the expiration of the Promotion Register that listed Hicks atop the rankings:

> The City had another vacated Lieutenant position that needed to be filled, but the City did not promote anyone from the Register. At the July 9, 2012 Fife Civil Service Commission Meeting, Commissioner Kory Edwards made a motion to extend the Lieutenant Register before its expiration on July 11, 2012. **Police Chief Blackburn arrived and convinced the Commission to let the Register expire so that Hicks would no longer be at the top of the list. The Commission agreed to let the Register expire. Hicks was not promoted to Lieutenant in retaliation.**

Id. (internal citations omitted, emphasis added). The City lacks authority over promotion lists. CP 103-104. The authority is vested exclusively with the Civil Service Commission. *Id.*

To the extent Hicks was attempting to hold the City liable for the acts of the Commission, the claim should be dismissed because Hicks named the wrong defendant. To the extent Hicks was attempting to hold the City liable for the statements of Chief Blackburn, as discussed below, Chief Blackburn did not speak with retaliatory intent and instead had two independent justifications for adopting a new promotion list. CP 99-102.

1. The City's Civil Service Commission Prepares Lists of Eligible Personnel for Promotion, But Promotion is Not Guaranteed.

Washington's civil service laws were intended to ensure all employment practices related to the hiring, firing, and promotion of law enforcement personnel are based on merit and not for political or discriminatory reasons. RCW 41.12 *et seq*. Consistent with this statutory direction, the City's Commission was created in 1968. *See* Fife Municipal Code § 2.52.010. The Commission is comprised of three members, each of whom serves a term lasting six years. *Id.* at § 2.52.015. The Commission is vested with the exclusive authority "to exercise the powers and to perform the duties set forth in this chapter in connection with the selection, appointment, and employment of police in the city." *Id.* at

§ 2.52.010. With respect to hiring decisions and promotions, the Commission is delegated the exclusive authority to "arrange for the administration of competitive examinations to determine the relative qualifications of persons for initial employment and for promotion in the classified service." *Id.* at § 2.52.160. To help facilitate this process, the Commission is also delegated the responsibility to "prepare an eligibility list of all persons eligible to fulfill any given position within the classified service, ranked in accordance with their total scores on any examination." *Id.* Promotion registers are valid for only one year unless the Commission takes special action. CP 124.

Candidates, such as Hicks, who rank first on a promotion register are not guaranteed the next available promotion to lieutenant. Fife Municipal Code § 2.52.030, § 2.52.160(F). Instead, the top three candidates on a promotion register are competitively considered for promotions. *Id.*

2. Chief Blackburn's Statements to the Civil Service Commission During an Public Open Meeting Regarding Expiration of the Promotion Register were Supported by Two Public Policy Considerations.

The retaliation claim alleged by Hicks is based on statements made by Chief Blackburn to the Commission on July 9, 2012. CP 2-3. As required by law, Commission meetings occur monthly and are open to the

public. Fife Municipal Code § 2.52.140. During the meeting, all three members of the Commission were present: Robert Thornhill, Jay Marks, and Kory Edwards. CP 103-104. The Commission routinely receives and considers comments from employees, members of the public, or other interested parties. *Id.* The Commission then votes on any matters before it. *Id.*

During the meeting, the Commission discussed expiration of the current lieutenant promotion register. CP 104. Commissioner Edwards motioned to extend the register for another year. *Id.* Before voting, the Commission heard from Chief Blackburn. CP 104-105. As recognized by Chairperson Thornhill, "receiving such comments is essential to the Commission in its decision-making, as it provides us with relevant information that we may not otherwise have." CP 104.

Chief Blackburn spoke in favor of allowing the current register to expire, supported by two arguments. CP 99-100. First, several new qualified candidates had recently joined the department or achieved higher levels of qualification, but were excluded from the current list. *Id.* Adopting a new list would broaden the pool of applicants, benefiting the City and promoting fairness among employees. *Id.* Second, the City was proposing the adoption of a new and improved testing process marketed by Skillworks. *Id.* A promotion register based on the Skillworks' testing

process was categorized as superior to the previous methodology because it was uniquely tailored to the City and more thoroughly tested specific issues related to supervisory skills and leadership. *Id.*

After hearing from Chief Blackburn, the Commission also heard from City Manager David Zabell and from a representative of Skillworks. CP: 103-105; 180-182. Both spoke at length of the benefits of adopting the Skillworks' testing process. Mr. Zabell learned of Skillworks earlier in the year and knew it came highly recommended from the Washington Association of Sheriffs and Police Chiefs. CP 180-182. He was particularly interested in Skillworks' testing process because the City recently had experienced problems with two lieutenants promoted using the current testing process. *Id.* Skillworks' testing process was superior because it focused not only on technical skills, but also on leadership issues, an important consideration for positions involving the supervision of subordinates. *Id.*

After learning of the potential advantages of utilizing the Skillworks' testing process, the Commission motioned to create a new eligibility register, allowing the current register to expire. CP 105. The motion passed unanimously. *Id.* Chairperson Thornhill confirmed that Hicks' top ranking on the expiring register was not a factor in the Commission's decision: "...the fact that Mr. Hicks was No. 1 on the list

that was about to expire did not factor into my decision to let the list expire. I was concerned with creating a list that had the best qualified candidates on it based on the best assessment center that the Commission could establish." *Id.* Likewise, Chief Blackburn confirmed his preference to adopt a new register based on the results of Skillworks' testing methodology and the availability of additional candidates, not because Hicks ranked first on the expiring register. CP 101.

On July 23, 2012, the Commission convened another public meeting to discuss the future testing of lieutenant candidates. CP 105. The Commission agreed to adopt the Skillworks' testing methodology. *Id.* Hicks was eligible to test for placement on the new promotion list. *Id.* According to Hicks, "[a]fter the list expired, it was obvious the City of Fire would not support Hicks for promotion." CP 353. However, Hicks declined to participate in the Skillworks' system and therefore was not eligible for promotion. CP 105.

C. Hicks' Attempt to Amend His Complaint Following Notice of the City's Anti-SLAPP Defense.

The City filed an answer to Hicks' complaint on July 1, 2014. CP 19-24. In its answer, the City notified Hicks of its intention to file a special motion to strike pursuant to Washington's anti-SLAPP statutes: "The City is immune from liability pursuant to RCW 4.24.510, *et seq.* on

plaintiff's retaliation claim against the City based on Chief Blackburn's oral statement to the Fife Civil Service Commission." CP 23. After filing its answer, the City began drafting its special motion to strike, due with the trial court within 60 days after the City was served with the complaint. RCW 4.24.525(5)(a). The City timely filed its special motion to strike on July 21, 2014. CP 75-98. Hicks, however, having been alerted of the City's anti-SLAPP defense, filed a motion to amend his complaint two court days earlier. CP 25-50. In this motion, Hicks requested to withdraw the offending retaliation claim but nevertheless argued that the City "misconstrued" his complaint. CP 26. The trial court denied Hicks' motion based on the stay imposed by the anti-SLAPP statute, RCW 4.24.525(5)(c). CP 341-342. Although Hicks attempted to remove the claim, he stated his intention to continue to prosecute the claim against the City. *See* RP 23 (8/8/2014).

D. The Trial Court's Ruling on the City's Motion to Strike Erred by Finding the Testimony Before the Civil Service Commission was Merely a "Piece of Evidence."

On August 25, 2014, the trial court heard oral argument on the City's special motion to strike. RP 1 (8/25/2014).[1] The trial court denied

[1] The trial court addressed the City's special motion to strike during two separate hearings. The first occurred on August 8, 2014 and the second occurred on August 25, 2014. To avoid confusion, the City will cite the date of the transcript when citing the Report of Proceedings (RP).

the motion, ruling that the challenged retaliation claim did not constitute a claim "based on an action involving public participation and petition." RCW 4.24.525(2). The trial court articulated the basis for its ruling:

> ...it appears to me that we get down to whether the principal thrust or gravamen of the claim is not whatever was said at the Civil Service Commission. It is retaliation. I think that's a piece of evidence. Whether that is a [misused] word or not is another story. But this isn't a situation in which the lawsuit is brought primarily to chill the valid exercise of the constitutional rights. It just doesn't seem like that fits.

RP 16 (8/25/2014). Instead, the trial court concluded the retaliation claim alleged by Hicks did not constitute a claim recognized by RCW 4.24.525, but instead constituted "evidence" or "facts" supporting a cause of action under WLAD. *Id.* This ruling was in error, requires the City to defend against a claim based on protected participation and petition activity, and is properly reversed.

E. Hicks Continues to Prosecute a Retaliation Claim Based on Protected Activity Before the Civil Service Commission.

In opposing the City's special motion to strike, Hicks attempts to characterize his lawsuit as only a single unified "cause of action" under WLAD:

> ...the cause of action that's under consideration for the Court in the strike motion is retaliation under the Washington Law Against Discrimination and encompasses all the allegations in our complaint...

RP 5 (8/8/2014). The statements and actions actually taken by Hicks in this lawsuit tell another story. When asked by the trial court to explain the type of evidence he hoped to uncover by probing into the open public meeting of the Civil Service Commission, Hicks admitted his intention to hold the City liable for protected participation and petition activity:

> We will talk about [the challenged retaliation claim] because it is evidence. You know, hypothetically the chief of police came into this public meeting and said "I don't want to promote Russell Hicks because he filed a human rights commission complaint about me and I'd never have him as my lieutenant." I mean certainly that kind of evidence isn't prohibited from us playing or utilizing at trial about his intent of why he didn't want to hire him...

RP 23 (8/8/2014) (quotations supplied). Based on this admission, the City now faces liability for activity protected by RCW 4.24.525.

Hicks' intent to prosecute the retaliation claim involving the Civil Service Commission is further demonstrated by written discovery served on the City. Hicks asks questions and requests documents related to actions taken during the open public meeting of the Commission

> Request for Production No. 17: Produce all documents regarding the decision not to extend Fife's Certified Eligibility Register for Police Lieutenant in 2012.
>
> Interrogatory No. 11: Identify each time the City of Fife has allowed its Certified Eligibility Register to expire while there was a vacant position and eligible candidates on the Register.

> Request for Production No. 22: Produce all documents regarding any decisions to let Fife's Certified Eligibility Register for positions in the police department to expire.
>
> Request for Production No. 23: Produce all documents regarding any decisions to extend Fife's Certified Eligibility Register for Police Lieutenant.
>
> Interrogatory No. 12: State how much money it costs to produce a Certified Eligibility Register for Police Lieutenant.
>
> Request for Production No. 24: Produce all documents regarding Fife's Certified Eligibility Register for Police Lieutenant, including but not limited to, costs for creating and maintain the Register.

See, *e.g.*, CP 555. The expansive nature of this discovery contradicts Hicks' assertion that he is not attempting to establish liability against the City for protected activity. Hicks likewise invited the trial court to listen to an audiotape of the open public meeting of the Commission because Chief Blackburn's alleged "retaliatory intent" could be heard: "An audio copy of this discussion is also included as the tone of the discussions supports a conclusion that Chief Blackburn did not want to promote Hicks." CP 353. None of this evidence is related to Hicks' other retaliation claims, demonstrating that Hicks continues to prosecute a claim of protected activity against the City.

IV. AUTHORITY AND ARGUMENT

A. Overview of Washington's Anti-SLAPP Statutes.

Beginning in 1989, Washington's legislature enacted the first statute intended to deter "strategic lawsuits against public participation," or SLAPP suits. RCW 4.24.510. The statute provides civil immunity to all parties who communicate information to local branches of government. *Id.*

In 2010, Washington's legislature enacted a new anti-SLAPP statute, RCW 4.24.525, broadening the scope of protected communications and creating a procedural device to swiftly curtail legal claims targeted at persons lawfully communicating on matters of public of governmental concern. "[T]he Washington legislature found that it is in the public interest for citizens to participate in matters of public concern and provide information on public issues that affect them without fear of reprisal through abuse of the judicial process." *Spratt v. Toft*, 180 Wn. App. 620, 629-30 (2014) (*quoting* Laws of 2010, Chapter 118 § 1). RCW 4.24.525 allows a defendant to file a special motion to strike any claim based on "an action involving public participation and petition." RCW 4.24.525(4)(a). The statute was designed to address "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." *Jones v.*

City of Yakima Police Dept., 2012 WL 1899228 at *2 (E.D. Wash. 2012) (*citing* Laws of 2010, Chapter 118 § 1). The statute was motivated by a desire to dismiss groundless claims before defendants are put to "great expense, harassment, and interruption of their productive activities." Laws of 2010, ch. 118 § 1. Recognizing that such lawsuits "can deter individuals and entities from fully exercising their constitutional rights to petition the government and to speak out on public issues," Washington's legislature enacted the anti-SLAPP statute to provide litigants with an "efficient, uniform, and comprehensive method for speedy adjudication." *Id.* To that end, the statute allows a party to file a special motion to strike "any claim that is based on an action involving public participation and petition." RCW 4.24.525(4)(a).

A special motion to strike filed pursuant to RCW 4.24.525 requires a two-step analysis. First, the moving party must demonstrate, by a preponderance of the evidence, that the challenged claim is "based on an action involving public participation and petition." RCW 4.24.525(4)(b). The scope of the statute is broad, covering most statements made in public forums:

- Any oral statement made, or written statement or other document submitted, in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

- Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

- Any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern; or

- Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.

RCW 4.24.525(2)(a)-(e). Second, "the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim." RCW 4.24.525(4)(b). If the responding party fails to meet this burden, the Court must grant the special motion to strike and award the moving party $10,000, plus attorney fees and costs. RCW 4.24.525(6)(a). "The legislature provided that the act shall be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts." *Spratt*, 180 Wn. App. at 630. "A court's interpretation and application of the anti-SLAPP statute is reviewed *de novo*." *Id.* at 629.

B. The City Established the First Step of the Anti-SLAPP Analysis Because Statements to the Civil Service Commission Constituted a Claim Involving Public Participation and Petition.

Under the first the anti-SLAPP analysis, the City must demonstrate, by a preponderance of the evidence, that Hicks' retaliation claim involving the Civil Service Commission constitutes "an action involving public participation and petition." Oral statements, such as Chief Blackburn's statements regarding the promotion list, made in a "legislative, executive, or judicial proceeding," are protected activity. RCW 4.24.525(2). Courts in Washington are in agreement that statements made during a civil service hearing are protected. *Castello v. City of Seattle*, 2010 WL 4857022 (W.D. Wash. 2010); *Skinner v. City of Medina*, 161 Wn. App. 1004 (2011) (unreported). In *Castello*, the federal district court ruled that disciplinary proceedings before the City of Seattle Public Safety Civil Service Commission constituted "proceedings within the purview of RCW 4.24.525." *Castello*, 2010 WL 4857022 at *5. Similarly, in *Skinner*, oral statements made by public employees were deemed protected by the anti-SLAPP statute: "In doing so, [the employees] were persons who communicated a complaint or information to a branch of local government regarding a matter reasonably of concern to that organization." *Skinner*, 161 Wn. App. 1004, *5 (applying

RCW 4.24.510). The City met its burden by demonstrating the retaliation claim targeted protected public participation and petition activity before the Civil Service Commission.

1. The Trial Court Erred by Characterizing the Retaliation Claim as "Evidence" or "Facts," But Not a "Claim."

The trial court committed error by ruling the retaliation claim challenged by the City was "evidence" or "facts," but not a "claim," therefore RCW 4.24.525 did not apply:

> ...it appears to me that we get down to whether the principal thrust or the gravamen of the claim is not whatever was said at the Civil Service Commission. It is retaliation. **I think that's a piece of evidence**. [...] I think that the real purpose of this statute is when it's directly on point, not when it's just one fact in a **series of facts**.

RP 16 (8/25/2014) (emphasis added). The trial court appears to have accepted Hicks' argument that the retaliation claim challenged by the City is not a "claim," but instead merely a summary of factual evidence supporting his WLAD cause of action. CP 311. While Hicks may attempt to frame the retaliation claim as "evidence," his characterization is not controlling. A court cannot merely accept a plaintiff's characterization of a claim because plaintiffs will always argue they challenge something other than protected activity. Recognizing this, Washington's legislature deviated from California's anti-SLAPP statute by defining RCW 4.24.525 to apply to "any claim, **however characterized**, that is based on an action

involving public participation and petition." RCW 4.24.525(2). The statute expressly applies to "any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing requesting relief." RCW 4.24.525(1)(a). Washington's legislature intentionally included both "claim" and "cause of action" in RCW 4.24.525, meaning both should be given independent meaning. Moreover, courts are expressly required to examine the facts of a "claim" for purposes of granting or denying a special motion to strike: "In making a determination...the court shall consider pleadings and supporting and opposing affidavits **stating the facts upon which the liability or defense is based.**" RCW 4.24.525(4)(c). The "evidence" of a "claim" is a central component for establishing liability under RCW 4.24.525 and should not serve as a basis for denying a special motion to strike.

Black's Law Dictionary defines "claim" as "an aggregate of operative facts giving rise to a right enforceable by a court." Black's Law Dictionary (9th ed. 2009). This approach is confirmed by the Civil Rules governing the form of pleadings:

> All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances ... **Each claim founded upon a separate transaction or occurrence, and each defense other than denials, shall be stated in a separate count** ... whenever a

> separation facilitates the clear presentation of the matters set forth.

CR 10(b) (emphasis added). Thus, while Hicks' lawsuit may be based under a single statute, WLAD, he still asserts several independent claims, each based on an "aggregate of operative facts," including a claim targeting protected activity of the Commission. The trial court committed error by failing to consider the retaliation claim as a "claim" under RCW 4.24.525.

2. The Trial Court Erred by Ruling that Hicks' Claim was Not Brought "Primarily" to Chill Protected Participation and Petition Activity.

The trial court likewise committed error by ruling RCW 4.24.525 applies only when a lawsuit is brought "primarily" to chill protected First Amendment rights:

> But this isn't a situation in which the lawsuit is brought **primarily** to chill the valid exercise of the constitutional rights. It just doesn't seem like that fits.

RP 16 (8/25/2014) (emphasis added). By ruling in this manner, the trial court appears to have accepted Hicks' argument that "there are no free speech rights targeted by Hicks." CP 359. This argument is not on point. RCW 4.24.525(2)(a)-(e) provides an enumerated list of examples of public participation and petition activity falling within the coverage of the statute. The statements made by Chief Blackburn undeniably constitute "oral statements made...in connection with an issue under consideration or

review by a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law." RCW 4.24.525(2)(b). Based on this language, the anti-SLAPP statute applies, regardless of whether Hicks was "primarily" focused on chilling First Amendment rights when he filed his lawsuit. If a claim "targets conduct that advances and assists the defendant's exercise of a protected right, then it targets the exercise of that protected right." *Davis v. Cox*, 180 Wn. App. 514, 530 (2014). No language in RCW 4.24.525 supports a conclusion that the moving party must establish the other filed his/her a claim with the primary purpose of chilling protected activity.

Case law from California addressing a similar anti-SLAPP statute support the City's position that the trial court's ruling was in error. "Washington's 2010 anti-SLAPP statute was patterned after California's anti-SLAPP statute. Thus, we can look to California cases for aid in interpreting the act." *Spratt*, 180 Wn. App. at 630-31. In an anti-SLAPP lawsuit from a decade ago, California's Supreme Court analyzed a special motion to strike brought against the City of Cotati after the City filed a declaratory judgment action against a mobile home park. *City of Cotati v. Cashman*, 29 Cal. 4th 69, 74, 124 Cal. Rptr. 2d 519 (Cal. 2002). The City argued the anti-SLAPP statute should not apply because its lawsuit was not "primarily" based on protected First Amendment activity. *Id.*

California's Supreme Court held that the question of "primary purpose" has no place in the anti-SLAPP analysis:

> Whether City's subjective motivations for filing this action were, in reality, primarily as City describes them, or primarily in accordance with Owners' speculation, cannot be ascertained with certainty from the record [...] Fortunately, the question of subjective intent is not relevant [...] The anti-SLAPP statute, construed in accordance with its plain language, incorporates no intent-to-chill pleading or proof requirement [...] In sum, judicial imposition of a chilling-effect proof requirement would contradict the anti-SLAPP statute's plain language, undermine the Legislature's expressed intentions, and create anomalies. The statute contains no such requirement.

Id. at 75-77 (internal citations omitted). Instead, California's Supreme Court noted that the anti-SLAPP statute "defined the types of claims that are subject to the anti-SLAPP procedures, *i.e.*, causes of action arising from *any* act of protected speech or petitioning [defined in the statute]." *Id.* at 75-76. Here, RCW 4.24.525 dictates that oral statements submitted to legislative or executive bodies, such as a civil service commission, are protected. The statute applies to the retaliation claim alleged by Hicks targeting the Civil Service Commission, irrespective of whether Hicks' primary purpose was to chill the City's protected participation and petition activity.

This Court should reject Hicks's argument that the anti-SLAPP penalties should not apply because his lawsuit is brought under WLAD, a

statute with important policy considerations that should be liberally applied: "A majority of the Washington Supreme Court has determined that the right to file a suit for discrimination in employment is a fundamental right under the Washington Constitution." CP 355. While WLAD may have a mandate for liberal constriction, so does RCW 4.24.525: "The legislature provided that [RCW 4.24.525] shall be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts." *Spratt*, 180 Wn. App. at 630. Second, while Hicks has the right to file a lawsuit under WLAD, he does not have a right to seek recovery based on protected participation and petition activity. Third, other courts have not had any reservations about applying the anti-SLAPP protections in response to discrimination claims targeting protected activity. *Hunter v. CBS Broadcasting*, 221 Cal. App. 4th 1510, 165 Cal. Rptr. 3d 123 (Cal. 2013) (in gender and age discrimination lawsuit, court ruled that employer's selection of female news anchor qualified as protected activity under anti-SLAPP statute).

3. The Principal Thrust or Gravaman of the Challenged Retaliation Claim is Protected Activity.

By ruling the retaliation claim challenged by the City did not actually constitute a "claim," and instead constituted "evidence," the trial court adopted Hicks' argument that the "principal thrust or gravamen" of

the claim involved retaliation under WLAD, not public participation and petition in violation of RCW 4.24.525. This was in error.

Washington's courts apply the following principle when determining whether a lawsuit targets protected activity in violation of RCW 4.24.525:

> To determine whether a pleaded cause of action falls within the ambit of Washington's anti-SLAPP statutes, the trial court must decide whether the claim targets activity involving public participation and petition. To properly do so, the trial court must focus on the principal thrust or gravamen of the claim.

Davis v. Cox, 180 Wn. App. 514, 523 (2014). In attempting to prove the "principal thrust" or "gravamen" of his lawsuit is retaliation in violation of WLAD, Hicks again argues that he asserts only a single "cause of action" under WLAD, not several independent claims of retaliation. According to Hicks, "[t]he thrust of Hicks' complaint is retaliatory refusal to promote." CP 359. This assertion ignores the other retaliation claims contained in Hicks' complaint. For example, in paragraph 4.1 of his complaint, Hicks argues the City instigated an unwarranted disciplinary investigation against him. CP 2. The "thrust" of this retaliation claim is unrelated to a refusal to promote. Likewise, in paragraph 4.4 of his complaint, Hicks argues that the City refused to let him serve as an instructor at the Criminal Justice Training Commission. CP 3. The "thrust" of this

retaliation claim is completely unrelated to a refusal to promote. Hicks' assertion that the "principal thrust" of his lawsuit is a refusal to promote is simply false. To the contrary, each of his retaliation claims are based on different allegations and each, standing alone, serves as an independent basis for liability under WLAD.

California courts have held the "principal thrust" or "gravamen" of a specific claim may be protected activity, even if the claim constitutes a "relatively small number of many alleged acts." *Haight Ashbury Free Clinics, Inc. v. Happening House Ventures*, 184 Cal. App. 4th 1539, 110 Cal. Rptr. 3d 129 (Cal. 2010). In *Haight*, a nonprofit medical clinic brought an action for breach of fiduciary duty against a nonprofit landlord and the founder of both nonprofits. The lawsuit contained an expansive set of allegations. *Id.* at 1544. The defendants filed an anti-SLAPP motion, targeting only two allegations in a cause of action. *Id.* at 1545. The trial court denied the motion, ruling the "gravamen" of the claims was mismanagement and self-dealing, not protected participation and petition activity. *Id.* at 1546. The court of appeals reserved, focusing on one paragraph in the complaint, in which two of the 16 alleged bases for liability involved protected activity, including conspiring to testify falsely in depositions and misrepresenting facts to a newspaper. *Id.* at 1547. While these two claims were not the focal point or "gravamen" of the

cause of action, the court of appeals nevertheless held that both claims were not "mere incidental" to unprotected activity because they could be the sole and adequate basis for liability:

> Because *each* of the subparagraphs of paragraph 31 purports to identify a breach of Smith's fiduciary duties, subparagraphs (o) and (p) could each be the sole and adequate basis for liability under the cause of action, even if [the plaintiff] could not provide any of the other subparagraphs.
>
> [. . .]
>
> [the plaintiff] notes correctly that the SLAPP statute is intended to deter lawsuits "brought *primarily* to chill the valid exercise" of First Amendment rights of free speech and petition. This does not suggest, however, that we need only make a quantitative comparison of allegations of protected versus non-protected activity.

Id. at 1550. Here, while Hicks lists several claims of retaliation against the City under WLAD, the allegations stemming from the Civil Service Commission, if standing alone, could be the "sole and adequate basis for liability" under WLAD. The retaliation claim, therefore, is not "merely incidental" to Hicks' other retaliation claims. The "principal thrust" or "gravamen" of the specific retaliation claim challenged by the City concerns protected participation and petition activity before the Civil Service Commission. The trial court committed error by ruling otherwise.

4. <u>This is a "Mixed" Lawsuit, and the Court is Permitted to Strike Specific Claims</u>.

In its special motion to strike, the City seeks to strike only the retaliation claim related to the Civil Service Commission, encapsulated in paragraph 4.3 of Hicks' complaint. Hicks continues to argue the anti-SLAPP statute is an "all or nothing" proposition, and therefore the motion must either be denied or his entire lawsuit is at risk of dismissal. In a "mixed cause of action" such as this one, where a plaintiff alleges both protected and unprotected activity, the trial court may strike only the protected activity, leaving the unprotected activity. Otherwise, a plaintiff could simply avoid the anti-SLAPP penalties by filing a lawsuit that includes both protected and unprotected claims. California courts are recently in agreement. *Cho v. Chang*, 219 Cal. App. 4th 521, 527, 161 Cal. Rptr. 3d 846 (Cal. 2013). In *Cho*, California's Court of Appeals held that a cause of action alleging both protected and unprotected activity under California's anti-SLAPP statute could be stricken in part to remove only the protected activity. The court explained its rationale:

> Appellate courts have wrestled with the application of the anti-SLAPP law where, as in this case, a single cause of action includes multiple claims, some protected by that law and some not.
>
> * * * *
>
> ...the guiding principle in applying the anti-SLAPP statute to a mixed cause of action case is that a plaintiff cannot frustrate the purposes of the SLAPP statute through a pleading tactic of combining allegations of protected and

> nonprotected activity under the label of one 'cause of action.'
>
> * * * *
>
> It would make little sense if the anti-SLAPP law could be defeated by a pleading, such as the one in this case, in which several claims are combined into a single cause of action, some alleging protected activity and some not. Striking the entire cause of action would plainly be inconsistent with the purposes of the statute. Striking the claims that invoke protected activity but allowing those alleging nonprotected activity to remain, would defeat none of them.

Id. at 526-27. The equities support application of *Cho* in Washington. On one hand, the City should not be prevented from relying on the protection of RCW 4.24.525 because Hicks engaged in a pleading tactic of combing both protected and unprotected claims. On the other hand, Hicks should not face dismissal of his entire lawsuit. Proceeding with a "mixed cause of action" analysis satisfies the legislative intent to "strike a balance between the rights of persons to file lawsuit and to trial by jury and the rights of persons to participate in matters of public concern." Laws of 2010, ch. 118 § 2(a).

Haight, discussed *supra*, was decided before *Cho*. When *Haight* was decided, Justice Needham of the California Court of Appeals filed a concurring and dissenting option articulating the rationale later adopted by *Cho*:

> **As mentioned, however, the anti-SLAPP statute requires that the plaintiff show a probability of**

> **prevailing not on "any part of its claim" or any part of its cause of action, but particularly on "the claim," referring to the allegations targeting protected activity**. In other words, the Legislature intended that the plaintiff demonstrate some minimal indication of merit to the allegations that target the particular activity the anti-SLAPP statute intended to protect.
>
> * * * *
>
> Where, as here, protected activity is alleged as an independent and alternative basis for liability in a cause of action, the inappropriate forfeiture of the entire cause of action might conceivably be avoided in one of two ways: (1) striking the entire cause of action, but permitting the plaintiff to amend the complaint solely to reallege the cause of action without the allegations of unsupported protected activity; or (2) **striking just the allegations of protected activity for which the plaintiff has not shown a prima facie case**. Both approaches accomplish the same equitable result.

Haight, 184 Cal.App.4th at 1556-58 (internal citations omitted; emphasis added).

California is not the only state with an anti-SLAPP statute similar to RCW 4.24.525, and other courts have ruled that protected claims asserted in a "mixed cause of action" can be stricken. *Louisiana Crisis Assistance Center v. Marzano-Lesnevich*, 878 F. Supp. 2d 662 (E.D. LA, 2012). In *Louisiana Crisis Assistance Center*, an attorney previously employed by a non-profit legal assistance center was sued by the Center after she published a series of essays about her employment experience. The Center claimed the attorney breached her employment contract and duty of confidentiality. *Id.* at 665. The Center also requested issuance of

a preliminary injunction to prevent any further essays from being published. *Id.* The attorney filed an anti-SLAPP motion, requesting the claim for injunctive relief be stricken on grounds it was an unconstitutional prior restriction that violated the First Amendment. *Id.* at 666. The federal district court initially denied the motion on grounds the anti-SLAPP statute could not be used to selectively target individual claims. *Id.* Upon reconsideration, the court closely examined Louisiana's anti-SLAPP statue:

> A ***cause of action*** against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or Louisiana Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established a probability of success on the ***claim***.

Id. at 667 (*quoting* La. Code Civ. Proc. 971(A)(1)) (emphasis in original). Examining the plain language of the statute, the court concluded specific claims of a lawsuit could be stricken: "The Court's prior ruling essentially conflates the terms 'cause of action' and 'claim' with the word 'lawsuit.' However, commonly accepted definitions reveal that they do not share the same meaning." *Id.* at 667. The court ultimately ruled that a special motion to strike could target a specific "claim" or "cause of action," thereby obligating the responding party to show a probability of prevailing on the specific claim challenged:

> There is no indication in the text that a special motion to strike need necessarily by an "all or nothing" proposition, as the Court's initial opinion suggested. Because a plain reading of the statute shows that [the anti-SLAPP statute] *can* be utilized to strike an individual cause of action, the Court's previous ruling was clearly erroneous...In light of this authority, the Court's previous holding that each of a plaintiff's claims survive a special motion to strike if a probability of success on the merits is shown as to any one of them was also in error.

Id. at 667-68.[2] (emphasis added).

The rationale articulated by *Cho*, the dissenting opinion in *Haight*, the federal district court in *Louisiana Crisis Assistance Center* should be adopted in Washington, permitting a trial court to strike specific claims that violate RCW 4.24.525.

C. Under the Second Step of the Anti-SLAPP Analysis, Hicks Cannot Establish, by Clear and Convincing Evidence, a Probability of Prevailing on the Claim.

Under the second step of the anti-SLAPP analysis, the burden shifts to Hicks "to establish by clear and convincing evidence a probability of prevailing on the claim." RCW 4.24.525(4)(b). "The role of the trial court in determining whether the plaintiff has met his or her burden under the second step of the anti-SLAPP motion to dismiss analysis is akin to the trial court's role in deciding a motion for summary judgment." *Davis v.*

[2] The federal district court in *Louisiana Crisis Assistance Center* ultimately denied the anti-SLAPP motion on other grounds. *Id.* at 671-72.

Cox, 180 Wn. App. at 533. Hicks cannot meet his burden with respect to the retaliation claim challenged by the City.

1. Hicks' Reliance on a California Decision, *Oasis West Realty v. Goldman*, is Misplaced.

Under the second step of the anti-SLAPP analysis, Hicks argues he can defeat the City's motion by showing a probability of prevailing on *any* aspect of his lawsuit, not just the specific retaliation claim involving the Civil Service Commission. Hicks supports this argument by citing to an opinion from California's Supreme Court: "Here, if Hicks can support his retaliation cause of action, then the Court must deny the anti-SLAPP motion." CP 362 (*citing Oasis West Realty, LLC v. Goldman*, 51 Cal. 4th 811, 124 Cal. Rptr. 3d 256 (Cal. 2011)). Reliance on *Oasis* is misplaced.

In *Oasis*, California's Supreme Court quoted a single sentence from an earlier decision, allegedly standing for the proposition that an anti-SLAPP motion is an all-or-nothing proposition: "... or once a plaintiff shows a probability of prevailing on any part of its claim, the plaintiff has established that its cause of action has some merit and the entire cause of action stands." *Oasis*, 51 Cal. 4th 811 at 820 (*quoting Mann v. Quality Old Time Service, Inc.*, 120 Cal. App. 4th 90, 106, 15 Cal. Rptr. 3d 215 (2004)). However, as recognized by several other California courts, *Oasis* was not a "mixed cause of action" and did not analyze

claims of both protected and unprotected activity laced together. Instead, the defendants in *Oasis* filed an anti-SLAPP motion and requested dismissal of the *entire* lawsuit, not specific claims. *Id.* at 815. Other California courts have been extremely critical of *Oasis*. In *Cho*, the court explained the problems associated with *Oasis*:

> We do not read the statement in *Oasis* so broadly. Instead, the guiding principle in applying the anti-SLAPP statute to a mixed cause of action is that a plaintiff cannot frustrate the purpose of the SLAPP statute through a pleading tactic of combining allegations of protected and nonprotected activity under the label of one 'cause of action.' This statement has been repeatedly reiterated in later decisions on this issue. It would make little sense if the anti-SLAPP law could be defeated by a pleading, such as the one in this case, in which several claims are combined into a single cause of action, some alleging protected activity and some not. Striking the entire cause of action would plainly be inconsistent with the purposes of the statute. Striking the claims that invoke protected activity but allowing those alleging nonprotected activity to remain, would defeat none of them.

Cho, 219 Cal. App. 4th at 527. Likewise, in a decision announced shortly after *Oasis*, California's Court of Appeals felt bound by *Oasis*, but nevertheless issued an opinion critical of the result:

> Under *Oasis,* where a cause of action includes multiple bases of liability, and a probability of prevailing is shown only as to one of them, all of the claims stay in the case and none are struck. Indeed, not only does *Oasis* permit the entirety of the cause of action to go forward, it precludes consideration of the merit of any other claims in the cause of action once a probability of prevailing is demonstrated as to one of them.

[. . .]

> Of greater concern to the matter before us, *Oasis* apparently did not involve a mixed cause of action. *Oasis* does not explicitly hold that, where a cause of action includes both protected and unprotected activity, and none of the protected activity has any merit, the entire cause of action can still proceed merely because there is some merit to the claim based on unprotected activity.

Wallace v. McCubbin, 196 Cal. App. 4th 1169, 1211-13, 128 Cal. Rptr. 3d 205 (Cal. 2011).

"Although the Washington [anti-SLAPP] statute was patterned after California's Anti-SLAPP Act, the two statutes are not identical. Thus, when resorting to California decisions as persuasive authority, courts applying Washington's anti-SLAPP statute must pay special attention to provisions of the California statute that the Washington State Legislature expressly adopted, modified, or ignored." *Jones v. City of Yakima Police Department*, 2012 WL 1899228, *3 (E.D. Wash. 2012). Unlike California law, Washington's anti-SLAPP statutes applies to "any claim...however characterized." *Compare* Cal. Code. Civ. Proc. § 425.16(b)(1) *with* RCW 4.24.525). The fact that RCW 4.24.525 defines "claim," "cause of action," and "lawsuit" separately evinces the Legislature's intention to allow specific claims of a lawsuit to be stricken, not just entire legal theories or entire complaints. To the extent *Oasis* has any application in Washington, it is based on poor rationale and should not

be adopted, particularly in light of the later decision in *Cho*.

RCW 4.24.525 supports the City's ability to strike the specific retaliation claim stated in paragraph 4.3 of Hicks' complaint. CP 2-3. Under the second step of the anti-SLAPP analysis, Hicks is required to establish, by clear and convincing evidence, a probability of prevailing on this specific retaliation claim. Hicks cannot meet this burden.

2. Hicks Retaliation Claim Fails Because the City is Not Liable for the Acts of the Civil Service Commission.

When the City was first served with Hicks' complaint, it appeared Hicks was attempting to establish liability against the City for both the actions of the Civil Service Commission and the statements of Chief Blackburn to the Commission. This conclusion is supported by language taken from Hicks' complaint: "The Commission agreed to let the Register expire. Hicks was not promoted to Lieutenant in retaliation." CP 3. After being alerted of the City's anti-SLAPP defense, Hicks now argues he never intended to hold the City liable for the acts of the Commission." "...Hicks neither sued the Commission, nor is Hicks targeting the inaction of the Commission." CP 347. Beyond the plain language of the complaint, Hicks' written discovery also suggests his intention to hold the City liable for the allegedly retaliatory acts of the Commission:

> Interrogatory No. 11: Identify each time the City of Fife has allowed its Certified Eligibility Register to expire while

> there was a vacant position and eligible candidates on the Register.
>
> Request for Production No. 22: Produce all documents regarding any decisions to let Fife's Certified Eligibility Register for positions in the police department to expire.
>
> Request for Production No. 23: Produce all documents regarding any decisions to extend Fife's Certified Eligibility Register for Police Lieutenant.

CP 555. The fact that Hicks was probing into this evidence betrays his assertion that he was not "targeting the inaction of the Commission." CP 347. Hicks cannot establish, by clear and convincing evidence, a probability of prevailing on the challenged retaliation claim because he has identified the wrong defendant. Washington courts, interpreting the civil service statutes, have recognized that civil service commissions operate independently from municipalities:

> To ensure substantial independence on the part of the civil service commission, the Legislature set forth specific attributes of the commissioners, as members of the administering body. The commissioners must be from different political parties, will not receive compensation, will be appointed for six years, and may only be removed for a good cause. These attributes establish an administrating body that is **independent from the employer**, creating protection for employees and job candidates from the evils of political patronage.

Seattle Police Officers' Guild v. City of Seattle, 121 Wn. App. 454, 459 (2004) (emphasis added). In fact, the entire purpose of the civil service system is to prevent municipalities from asserting undue or illegal influence over the hiring and promotion of police and fire employees:

> ...the fundamental purpose of the civil service laws is to require public officials to hire, promote, and discharge employees based on merit rather than political affiliation, religion, favoritism, or race...Civil service systems must protect police and fire department employees from the arbitrary and discriminatory actions of their employers in hiring, promotions, discipline, and discharge...

Id. (*quoting City of Yakima v. Yakima Firefighters Ass'n*, 117 Wn.2d 655, 664-65 (1991)). Interpreting the rules of civil procedure and rules of appeal, Washington courts have likewise recognized that municipalities and civil service commissions are distinct legal entities. *See Bunko v. City of Puyallup Civil Service Commission*, 95 Wn. App. 495 (1999) (for purposes of identifying parties on notice of appeal, court recognized that a municipality and its civil service commission were two distinct entities, albeit with potential for an identity of interests). *See also Haas v. City of Tucson*, 84 Fed. App'x. 921 (9th Cir. 2003) (court granted summary judgment to municipality where commission held exclusive power over termination hearings but was not identified as a defendant; court ruled civil service commission was a distinct legal entity from a municipality).

Because the Civil Service Commission is not a defendant, Hicks argues the City lacks standing to assert a defense:

> Because Fife argues the Civil Service Commission is a separate legal entity from the City, Fife cannot move on behalf of the Commission. Fife lacks standing.

CP 358. The fact that Hicks failed to identify the correct defendant for one of his retaliation claims does not provide immunity to a special motion to strike brought under RCW 4.24.525. While the City is the incorrect defendant, it was still put to "great expense, harassment and interruption of [its] productive activities" by being required to answer Hicks' complaint, respond to discovery, and file its special motion to strike. RCW 4.24.525, Laws of 2010, ch. 118 § 1(b). Had the City not filed its special motion to strike, nothing would have stopped Hicks from arguing the City was liable for the acts of the Commission. Hicks' argument regarding standing lacks merit.

3. Hicks' Retaliation Claim Fails Because Chief Blackburn's Statements to the Civil Service Commission Do Not Constitute Retaliation.

Hicks attempts to hold the City liable for Chief Blackburn's statements to the Civil Service Commission. Hicks cannot establish, by clear and convincing evidence, a probability of prevailing on this claim.

Hicks argues the City may not file a special motion to strike on behalf of Chief Blackburn because he lacks free speech rights: "...Chief Blackburn does not have free speech rights for his statements made as part of his job duties." CP 360. This argument is not dispositive. It is undisputed that Chief Blackburn's statements to the Commission constituted "any oral statement made...in a legislative, executive, or

judicial proceeding or other governmental proceeding authorized by law." RCW 4.24.525(2)(a). The City has standing to file a special motion to strike. Obviously, a municipal corporation such as the City can only act by and through individuals. *Biomed Comm. Inc. v. State Dept. of Health Bd. of Pharmacy*, 146 Wn. App. 929, 934 (2008) (corporation can only act through its authorized representatives). As a result, RCW 4.24.525(1)(e) defines "person" to include corporations or other legal entities.[3] The City is being sued because its employees engaged in protected participation and petition activity. Where a municipality is alleged to be liable for its employees' acts within the purview of the anti-SLAPP statute, the protections apply. *Bradbury v. Superior Court*, 49 Cal. App. 4th 1108, 1113-14, 57 Cal. Rptr. 2d 207 (Cal. 1997) (vicariously liable governmental entities and their representatives are included in the anti-SLAPP statute's protection of petitioning rights); *Vargas v. City of Salinas*, 46 Cal. 4th 1, 17, 92 Cal. Rptr. 3d 286 (Cal. 2009) (same). The City has the right to bring a special motion to strike pursuant to RCW 4.24.525 based on the acts of its employees. The fact that Chief

[3] *Henne v. City of Yakima*, 177 Wn. App. 583, 589 (2013), *review granted*, 179 Wn.2d 1022 (2014) (holding a municipality is legal entity under RCW 4.24.525); *Schaffer v. City and County of San Francisco*, 168 Cal. App. 4th 992, 1002-03, 85 Cal. Rptr. 3d 880 (Cal. 2008) (governmental entities constitute "persons" for purposes of California's anti-SLAPP statute).

Blackburn lacked First Amendment rights as a governmental employee is irrelevant.

More importantly, Hicks cannot establish WLAD liability against the City based upon Chief Blackburn's statements to the Commission because he cannot show unlawful pretext with clear and convincing evidence. Under the burden shifting analysis required of a WLAD discrimination claim, an employer may rebut a *prima facie* case of retaliation by establishing a legitimate, nondiscriminatory reason for its actions. *Renz v. Spokane Eye Clinic*, 144 Wn. App. 611, 618 (2002). The burden then shifts back to the employee to establish that the employer's stated reason is a pretext for retaliation. *Id.* at 618-19. Hicks' rebuttal falls short because he has focused on evidence supporting his *other* retaliation claims, not the claim challenged by the City in its special motion to strike. The City demonstrated two lawful and legitimate reasons supporting expiration of the lieutenant promotion list and adoption of a new list. CP 99-100. First, several new qualified candidates were excluded from the expiring eligibility list, but adoption of a new list would afford these candidates an opportunity to test for promotion to lieutenant. *Id.* Adopting a new list would therefore promote internal fairness among employees and expand the pool of qualified candidates. *Id.* Second, the expiring eligibility list was based on a prior assessment system, but

adoption of a new list would be based on the Skillworks' assessment system, which was uniquely tailored to the City and better targeted issues related to supervision and leadership. *Id.* Both of these factors were legitimate and nondiscriminatory, and were supported by Chief Blackburn, City Manager Dave Zabell, the members of the Commission, and a representative from Skillworks. Hicks was afforded the opportunity to test under the Skillworks system but refused.

Under federal law, using the more stringent summary judgment standard (where clear and convincing evidence does not apply), courts have ruled the expiration of a stale promotion list is both legitimate and nondiscriminatory. *Hozzian v. City of Chicago*, 585 F. Supp. 2d 1034 (N.D. Ill. 2008). In *Hozzian*, a probationary firefighter candidate filed an age discrimination action against the City of Chicago after being replaced by younger candidates on an eligibility list. Plaintiff was ranked on a 1995 eligibility list that was replaced with a new list in 2006 after it became available. The City of Chicago moved for summary judgment, arguing that even if the plaintiff established a *prima facie* claim of discrimination, the city had a legitimate, nondiscriminatory reason for replacing the 1995 list: "Even if [the plaintiff] was able to establish a *prima facie* case, he has not met his burden of showing that the City's purported reason for canceling the 1995 eligible list—because the 2006

list was posted and ready---was pretext for discrimination." *Id.* at 1040. The court ruled that several arguments supported the City of Chicago's position: (1) the newer 2006 list was posted and available; (2) the 1995 list had become stale; (3) new qualified candidates were available for consideration who were excluded from the 1995 list; and (4) the city, pursuant to its policies, reserved the right to cancel or extend a promotion list at any time. *Id.* "Therefore, even if [the plaintiff] was able to make a *prima facie* case of discrimination, his claim would still fail because he has not met his burden of establishing pretext." *Id.* Other federal courts are in accord. *See, e.g., U.S. v. City of Chicago*, 796 F.2d 205, 211 (7th Cir. 1986) ("We think there might be serious problems in requiring the City to use a potentially stale test, particularly since the City Personnel Code requires keeping an eligibility list for only one year."). During the underlying trial court hearing, Hicks never attempted to rebut this case law. Hicks had the affirmative burden to come forward with evidence demonstrating, with clear and convincing evidence, that the decision to allow the eligibility list to expire was pretext for discrimination. Plaintiff has not met this burden. The City satisfied the second element of the anti-SLAPP analysis. Its special motion to strike should have been granted.

V. CONCLUSION

Based on the foregoing authority, the City requests the Court reverse the trial court's order denying its motion to strike, strike the specific retaliation claim challenged by the City involving the Civil Service Commission (paragraph 4.3 of Hick's complaint), and award the statutory $10,000 penalty and award of attorneys' fees and costs.

DATED this 9th day of February, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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